



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE
ACTION OF THE
CIVIL SERVICE COMMISSION**

In the Matter of E.R., Fire Fighter
(M2554M), City of Newark

List Removal Appeal

CSC Docket No. 2017-3402

ISSUED: JUNE 14, 2019 (DASV)

E.R., represented by Bette R. Grayson, Esq., appeals the removal of his name from the eligible list for Fire Fighter (M2554M), City of Newark, on the basis of psychological unfitness to perform effectively the duties of the position.

The relevant facts are as follows:

1. The appellant's name was certified on December 2, 2015 from the Fire Fighter (M2554M), City of Newark, eligible list. In disposing of the certification, the appointing authority requested the removal of the appellant's name as he was found psychologically unsuitable for the position. The appellant was then sent a notice of removal dated November 1, 2016. It is noted that candidates wishing to appeal must do so within 20 days of the date on the notice. *See N.J.A.C. 4A:4-6.5(c)2*
2. By letter dated April 21, 2017 and postmarked April 22, 2017, the appellant appealed his removal, indicating that he never received notice and the reasons for his removal.
3. A letter, dated May 16, 2017, was sent to the appellant's attorney and the appointing authority acknowledging the appeal and advising that submissions are to be filed within 20 days. The parties were also informed that since the appellant had indicated that he did not receive the notice of removal, he

was to submit a sworn notarized statement attesting to that statement. Additionally, the letter indicated that it was advisable for the appellant to obtain a professional recommendation to support his appeal. Such recommendation was to be signed by a New Jersey licensed psychologist or psychiatrist. The May 16, 2017 letter was *not* returned as undeliverable.

4. In a letter dated June 13, 2017 and postmarked June 14, 2017, the appellant's attorney advised that the appellant had retained Dr. Chester Sigafos to evaluate him. She requested psychological evaluations conducted on the appellant, including prior examinations conducted for a different position.
5. Thereafter, since the sworn notarized statement was not filed, staff from the Division of Appeals and Regulatory Affairs contacted the appellant's attorney via email on August 7, 2017 to submit the sworn statement. Additionally, a copy of the March 2, 2016 pre-appointment psychological report and tests for the Fire Fighter position were emailed to the appellant's attorney at that time. In response, the appellant's attorney indicated that she was not aware that a sworn affidavit was needed. She also confirmed that she had received and reviewed the pre-appointment psychological examination materials.
6. On August 8, 2017, the appellant submitted a "Supplemental Affidavit in support of [his] appeal." He indicated that that he never received notification that he was removed from the Fire Fighter eligible list.
7. By letter, dated November 28, 2017, agency staff sent the appellant's attorney a letter, indicating that although the appellant was provided with an opportunity, no substantive documentation had been received within the timeframe allowed to refute the findings of the pre-employment psychological examination. In that regard, staff noted the new 90-day time requirement set forth in *N.J.A.C. 4A:4-6.5(e)* in filing an independent psychological report. Accordingly, since the appellant had not submitted such a report, there was no basis to disturb the appointing authority's determination. Therefore, the appeal file was closed. The November 28, 2017 letter was *not* returned as undeliverable.

One year later, in a letter dated November 28, 2018, the appellant's attorney requested the status of the matter as she was waiting for notification that the appellant's affidavit was accepted. She further stated that when she had not heard from the Civil Service Commission (Commission), she attributed it to the "fact" that there was not a "full board" for the matter to be presented. Moreover, she noted that the appellant had "[i]n the interim . . . located and saved the funds required to pay the forensic psychiatric evaluator." In response, on December 10, 2018, staff forwarded her the November 28, 2017 letter, advising that the appeal file had been closed. The appellant's attorney replied that she did not receive the letter, and by letter dated December 20, 2018, she requested that the appeal be re-opened. Additionally, on February 7, 2019, Dr. Sigafos' psychological evaluation of the appellant was forwarded to the Commission. Dr. Sigafos indicated that "[t]he results of this evaluation find the candidate to be suitable for a position of a fire fighter." It is noted that Dr. Sigafos evaluated the appellant on January 10, 2019, and his report was dated February 3, 2019. Given this information, the parties were informed on February 13, 2019 that the matter would be forwarded to the Commission for a determination as to whether the appeal would be re-opened and the report accepted.

In response, the appointing authority, represented by France Casseus, Assistant Corporation Counsel, maintained that the appellant was "aided with the assistance of counsel during the appeal period." It emphasized that the Commission provide notice as to when the psychological report was due and the appellant failed to submit the same. The appointing authority also asserted that the appellant failed to demonstrate good cause for "his substantial delay" as he now seeks to re-open the matter "almost two years after his report was due and 14 months after the matter ha[d] been closed." Therefore, the appointing authority requested that the matter remain closed.

The appellant's attorney replied that the appointing authority "failed to state how the City of Newark was prejudiced in any way by the delay" of the submission of the appellant's psychological report. She emphasized that while the appellant was aided by counsel, she "NEVER RECEIVED ANY RESPONSE OR NOTICE FROM THE COMMISSION AFTER I FILED." It is noted that the appellant's attorney did not submit a certification or affidavit.

CONCLUSION

N.J.A.C. 4A:4-6.3(b) states that the appointing authority shall have the burden of proof in medical or psychological disqualification appeals. Moreover, *N.J.A.C.* 4A:4-6.3(d) states that:

Upon receipt of a notice of an eligible's appeal, the appointing authority shall submit to the [Commission], within 20 days, all

background information, including any investigations and all complete medical, psychological, and/or psychiatric reports that were the basis for the removal request.

1. The appointing authority shall also furnish to the appellant's attorney or to a New Jersey licensed psychologist or psychiatrist of the appellant's choice upon request all of the information supplied to the [Commission].
2. Any appointing authority failing to submit the required materials within the specified time may have its request for removal denied, and the eligible's name may be retained on the eligible list.

Additionally, in order to further facilitate the timely processing of these types of appeals, the Commission amended *N.J.A.C.* 4A:4-6.5(e), effective June 21, 2017, to require that the appellant, if he or she chooses to do so, to submit a report from a physician or psychologist/psychiatrist to rebut the appointing authority's report within 90 calendar days of filing of the appeal. *See* 49 *N.J.R.* 492. These timeframes were designed to facilitate the opportunity for the parties to establish a contemporaneous record of an eligible's medical or psychological condition at the time of appointment for the Commission to consider.

In the instant matter, the 90-day time period was not effective at the time the appellant filed his appeal. Regardless, the appellant waited almost two years from the time he filed his appeal on April 22, 2017 to submit his psychological report on February 7, 2019. The appellant's attorney maintains that she did not receive notice of the acceptance of the appeal. Presumably, the appellant's attorney did not receive the May 16, 2017 letter sent to the parties which acknowledged the appellant's appeal and provided information regarding the processing of such an appeal. While it is customary for this agency to send notice to the parties of a pending psychological disqualification appeal, Civil Service rules require only that the appellant be provided with the opportunity to submit a report from a physician, psychologist or psychiatrist of his or her own choosing. *See N.J.A.C.* 4A:4-6.5(c) and *N.J.A.C.* 4A:4-6.5(c). The appellant had sufficient opportunity to submit a report throughout the pendency of the appeal. The record reveals that the appellant's attorney acknowledged on August 7, 2017 that she received and reviewed the pre-appointment psychological report. It is inexplicable as to why the appellant did not respond at that time to rebut the report. The excuse of the appellant's attorney is not plausible. While she asserts that she was waiting for acceptance of the appellant's affidavit to submit a report, she also states in her November 28, 2018 letter that the appellant had "[i]n the interim . . . located and saved the funds required to pay the forensic psychiatric evaluator." This suggests that the appellant may not have been in a financial position to have been evaluated by a psychologist

during the pendency of the appeal. While the Commission understands the financial burden an appeal may cause, it does not overcome an appellant's responsibility in pursuing his or her appeal. An appeal cannot be held open for that reason. Based on longstanding administrative practice, a psychological assessment for employment in law enforcement is only considered valid for one year. *See In the Matter of Aleisha Cruz* (MSB, decided December 19, 2007), *aff'd on reconsideration* (MSB, decided April 9, 2008).

Furthermore, neither the May 16, 2017 or November 28, 2017 letter sent to the appellant's attorney was returned to the Commission as undeliverable. There is a presumption that mail correctly addressed, stamped, and mailed was received by the party to whom it was addressed. *See SSI Medical Services, Inc. v. State Department of Human Services*, 146 N.J. 614 (1996); *Szczesny v. Vasquez*, 71 N.J. Super. 347, 354 (App. Div. 1962); *In the Matter of Joseph Bahun*, Docket No. A-1132-00T5F (App. Div. May 21, 2001). The appellant's attorney does not submit a certified statement or affidavit in that regard. Thus, nothing in the record rebuts this presumption. The appellant's attorney waited one year to contact the Commission regarding the case. While she notes that when she had not heard from the Commission, she attributed it to the "fact" that there was not a "full board" for the matter to be presented. However, from April 2017 through November 2018, the Commission and the Medical Review Panel, which reviews psychological disqualification appeals for the Commission, have had meetings regularly during that time period.

Lastly, it is prejudicial to the appointing authority, and potentially a current employee, to allow the appellant's appeal to be re-opened over three and half years since he was certified. The remedy provided to successful appellants in psychological disqualification cases is a mandated appointment to the position with a retroactive date of appointment for seniority and salary step purposes. Should a position not be available, the last employee hired must be displaced. *See In the Matter of Stanley Kolbe, Jr.* (CSC, decided May 21, 2014) (Commission enforced prior order granting retroactive appointment to the appellant after a mandated appointment resulting from successfully appealing a failed psychological evaluation and dismissed the appointing authority's claims of fiscal constraints and recent layoff when three employees who ranked lower than the appellant on eligible list were not impacted by the layoff).

Therefore, under these circumstances, the appellant has failed to show good cause to re-open his appeal and for the Commission to accept Dr. Sigafos' report. *See e.g., In the Matter of Gary E. Crook* (MSB, decided June 25, 1996) *aff'd on reconsideration* (MSB, decided August 5, 1997) (Appellant who waited 15 years and then asserted he should have been appointed from a Fire Fighter list not entitled to appointment due to his profound lack of diligence in pursuing a remedy). *See also, In the Matter of L.L.* (CSC, decided March 27, 2019) (Commission found that there

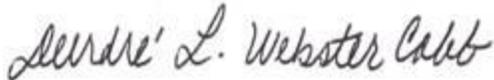
was not good cause to relax the provisions of *N.J.A.C. 4A:4-6.5(e)* which requires an appellant to submit a psychological report after 90 calendar days of filing an appeal. The appellant's attorney claimed he never received various letters from this agency. However, the Commission noted that none of the Commission's letters addressed to the appellant's attorney were returned as undeliverable, the appointing authority submitted its psychological report to the appellant's attorney, the request to relax the rules was received well after the case was closed, and the appellant's attorney did not submit an affidavit indicating that he never received the prior letters).

ORDER

Therefore, it is ordered that this appeal be dismissed.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF JUNE, 2019



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